No. 80-985

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1980

PUTNAM FABRICATING COMPANY
(a division of Union Boiler
Company), a corporation,

Petitioner,

vs.

ROGER NULL, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does § 301(a) of the Act[1/] create federal subject matter jurisdiction for a claim of damages brought by an employer against individual employees who have already been discharged for engaging in a wildcat strike when: (1) § 301(a) does not expressly provide federal jurisdiction for such claims and (2) a personal judgment would expose the assets of the employees to execution contrary to the "Danbury Hatters" policy of § 301(b)?

1/ Labor Management Relations Act of 1947, 29 U.S.C.A. 185(a).

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ADDITION TO STATEMENT OF THE CASE

In addition to the matters set forth by Employer[2/] in its Statement

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[2/] The Respondents will at times be referred to as "the Employees" and the Petitioner will at times be referred to as the "Employer". The Petition will be referenced as "Pet. __".

This Brief in Opposition is submitted only by some of the named

of Facts, it should be noted that upon issuance and service of the Boys Markets injunction requested by the Employer the picketing effectively ended.[3/]

REASONS FOR DENYING THE PETITION

1. The facts of this record are distinguishable from those of Complete Auto Transit.

In the present case, unlike Complete Auto Transit, Inc. v. Reis,

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2/(cont'd)
Respondents: Larry Moore, Joseph Cox, Larry Beller, Earl Cunningham, Robert Cook, Russell Spaulding and Aubrey Asbury.

3/ Inasmuch as the injunction contained findings concerning the existence of a strike over an arbitrable issue (see page 11 of Joint Appendix filed in the Court of Appeals (hereinafter "JA"), it was apparently issued under the authority of Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 254 (1970).

No. 79-1777 (October 14, 1980), a Boys Markets injunction was issued and, by the time the Employees were sued, they had been discharged. The Employer had thus reaped the full benefit of the policies underlying § 301(a) in that it had obtained the assistance of the District Court in ending the strike and had discharged the striking employees. In Reis, the employer obtained Boys Markets relief against the union and did not discharge the strike employees.

2. The decision below interpreted correctly the wording and the legislative history of §§ 301(a) and (b).

The Petition should be denied because the decision below, and the decisions of the two other Courts of

Appeals[4] are based upon a uniform and sound analysis of the wording and legislative history of Section 301. The Court of Appeals adopted the rationale of the 1971 decision of the Seventh Circuit in Sinclair, supra, that:

1. Section 301(a)[5] does not create federal subject matter jurisdiction.

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[4] Sinclair Oil Corp. v. Oil Workers International, 452 F.2d 49 (7th Cir. 1971) (hereinafter "Sinclair"); Steelworkers v. Lorain, a division of Koehring Co., ___ F.2d ___ (6th Cir. Nos. 77-1678-9, Feb. 14, 1980); and Reis, supra, 614 F.2d 1110 (6th Cir. 1980).

[5] Suits by and against labor organizations.
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

2. Even if, arguendo, § 301(a) did create federal jurisdiction for such damage claims against the individual workers, the Danbury Hatters Policy of § 301(b) rules out damage relief against individuals.

The Seventh Circuit said:

> Section 301 does not expressly authorize suits between an employee union member and his employer arising from bargaining contracts. ...
>
> The "legislative history" of § 301 does not disclose a congressional purpose to authorize ... an employer suit against employee union members arising from a wildcat strike.

Id., 452 F.2d at 52.

Neither the wording of § 301(a) itself nor the legislative history recited by the Employer at Pet. 6-7 indicates or suggests any intent to

create federal jurisdiction for employer claims against employees in those cases where the employer does not have a claim against the union. The snatches of legislative history quoted in the Petition do not support the creation of such jurisdiction. Even though the Employer recognizes that 301 was concerned with the creation of "corporate-like" status for unions (Pet. 6), the Employer ignores the force of the unquestioned proposition that in 1947 Congress was primarily concerned with making unions effectively liable for the union wrongs. Sinclair, 452 F.2d at 52-4.

Although § 301(a) was broadly applied by this Court in Lincoln

Mills[6] and in the cases following, this Court made it clear in a wildcat strike setting that the Danbury Hatters policy of § 301(b) is to be just as broadly applied.

> The legislative history of § 301(b) makes it clear that this third clause[7] was a deeply felt congressional reaction against the Danbury Hatters clause[8] ... and an ex-pression of legislative

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[6] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

[7] The clause, exempting agents and members from personal liability for judgments against unions even when the union is without assets, is quoted at footnote 10, infra.

[8] Loewe v. Lawlor, 208 U.S. 274 (1908); Lawlor v. Loewe, 235 U.S. 522 (1915); Loewe v. Savings Bank of Danbury, 236 F.2d 444 (2d Cir. 1916), all of which are summarized in Atkinson, 370 U.S. at 248.

> determination that the aftermath ... of that decision in which many members lost their homes was not to be permitted to recur.

Atkinson v. Sinclair Refining Co., 370 U.S. 238, 248 (1972) (hereinafter "Atkinson").

> ... Consequently, in discharging the duty Congress imposed upon us to formulate the federal law to govern § 301(a) suits, we are strongly guided by and do not give a niggardly reading to § 301(b). 'We would undercut the act and feed its policy if we read § 301 narrowly.' (Lincoln Mills, 353 U.S. at 456 (1957)

Id. at 248-49. The citation of Lincoln Mills as authority for a broad reading of § 301(b) completely undermines the cornerstone of the Employer's argument that Lincoln Mills is authority for creating the damage remedy against individuals by the process of "judicial inventiveness". See Pet. at 8.

Employer forgets that, notwithstanding Lincoln Mills,[9] § 301(a) creates federal subject matter jurisdiction. Unless such jurisdiction is created, it does not exist. The Court of Appeals did not take away something from the Employer; it simply held that the Employer never had any federal jurisdiction to begin with. Section 301(a) simply does not create the jurisdiction the Employer would have it create.

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[9] The federal policy favoring arbitration, for example, has justified expansive interpretations of 301(a) jurisdiction in the Steelworkers Trilogy (Steelworkers v. American Mfg. Co., 363 U.S. 564; Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574; Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)); and Boys Markets, supra, 398 U.S. at 242, 252-3, and Sinclair, 452 F.2d at 54 n. 10. That policy, and other federal labor policies discussed at pp. 15-17,

Even if the snatches of legislative history relied upon by the Employer did, arguendo, create some doubts as to the scope of § 301(a) jurisdiction, such doubts are readily put to rest by the Danbury Hatters policy reflected in the third clause of § 301(b).[10]

9/(cont'd) infra, are not involved in this case. Any question of jurisdiction of the District Court to issue the Boys Markets injunction against individuals was not appealed and is not present herein. However, it certainly could be argued that injunctive jurisdiction against individuals exists in view of the remedial purposes of Boys Markets and the avoidance of "industrial strife". Id., 248 U.S. at 249, cited in Sinclair, 452 F.2d at 54. See Comment, 86 Harv.L.Rev. 447, 458 (1972).

10/ That clause states:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual members of his assets.

The concern of Congress -- employees "los[ing] their homes"[11/] in the aftermath of litigation against employees for peaceful collective activity -- is the same in this case or in Danbury Hatters. Typically, the assets of workers in traditional terms of real and personal property, are limited. Usually, the home of a worker is his most substantial and easily levied upon asset. His income, the wages from his labors, are by far his most important resource. A judgment for even the relatively modest losses alleged by the Employer[12/]

[11/] Atkinson, 370 U.S. at 248; Sinclair, 452 F.2d at 52; Comment, 86 Harv.L.Rev. 447, 452 (1972).

[12/] The Employer submitted an affidavit that its damages were $13,056.94 (JA 77).

could have disastrous consequences on the individual Respondents herein, each of whom would be jointly liable. Congress was clearly concerned with the social welfare implications of employees and their families being thrown out of their houses on account of "non tortious unprotected concerted activity". Sinclair, 452 F.2d at 54. That directive applies to the facts herein as it did to Danbury Hatters.

3. The decision below serves the federal policies of avoidance of industrial strife by minimizing involvement of the federal courts in nonproductive or counterproductive labor litigation, and carries out the essentially remedial purposes of the Act.

Any judgment -- no matter how disastrous the effects of levy and execution on the individual worker might be -- would in the end be difficult to effectively collect. Professor Gould concluded that compensation to the Employer would not be the motivation for damage suits against individual workers for peaceful collective activity.

> A damage suit would not be aimed at compensation for losses, which is normally the motive for § 301 suits. Employees, unlike the union, could not possibly have the resources to compensate the employer. The suit's motivation would, therefore, be that of a deterrent ...

Gould, "The Status of Unauthorized and 'Wildcat' Strikes Under the National Labor Relations Act," 52 Cornell L.Q. 672, 703-4 (1967); see Comment, 86 Harv.L.Rev. 447, 451.

The attempts of the employer to create federal subject matter jurisdiction must also be examined in light of §§ 7 and 8 of the Act, 29 U.S.C. 157 and 158.

> Section 7 and 8 regulate wildcat strikes on the assumption that the severest penalty inflicted on an unprotected employee is discharge. Since the question of whether an employee may be discharged or replaced is central to the scheme of protected and unprotected activity, a damage suit against workers would be inconsistent with federal law because the act assumes that discharge is the ultimate penalty. Damages would constitute an attempt to duplicate the federal scheme of penalties for wildcat strikers.

Gould, supra at 13, p. 703-4; Comment, 86 Harv.L.Rev. 447, 453-4, 458. The remedy of discharge free of the powers of the NLRB to order reinstatement in the enforcement of §§ 7 and 8, especially when considered in light of

the reality that the income of a worker from his job is normally his most valuable financial resource, is, indeed, a formidable weapon.

Damage suits against individual employees would involve the federal judiciary in the "industrial strife" this Court sought to avoid Boys Markets.

> Neither the threat nor the prosecution of a damage suit will often provide the employer with an effective means of ending the work stoppage. Industrial peace requires labor-management cooperation; but a damage suit is likely to produce only animosity, hampering future bargaining and creating an atmosphere not readily conducive to reasoned negotiation. Furthermore, a wildcat strike will often be the product of emotional ferment over an immediate issue. In such a situation, the average worker may be neither informed about the possibility of a damage suit nor intimidated by an employer's threat to bring such a suit. Thus, the availability of a damage remedy would not necessarily bring about a quick return to work.

Comment, 86 Harv.L.Rev. 447, 451-2 (1972).

Individual liability for damages would be double punishment. The consequences of discharge include immediate loss of income, difficulty in obtaining a new job and the stigma of having lost a job. Congress decided in § 301(b) that a second wave of consequences including the "fiscal ruin" of workers being thrown out of their houses and the seizure of their bank accounts and earnings -- was not to be "visited" upon workers. Sinclair, 452 F.2d at 52.

Punishment beyond discipline or discharge would also be contrary to the "'essentially remedial' objectives of the national labor relations act." IBEW v. Foust, 442 U.S. 42, 52 (1979). In view of the reality that most judg-

ments like the one sought by this Employer cannot be enforced and that the litigation itself would not be economical from the plaintiff's point of view, one can only conclude that the motivation for these suits may not be economic recovery but may be harrassment and further punishment of wildcatting employees -- contrary to "general labor policy [which] disfavors punishment ...". Foust, Id.

The availability of a new remedy against individuals could well undermine "the effectiveness of unions as collective bargaining agents."[13/]

13/ Although IBEW v. Foust, 99 Sup.Ct. 2121, 2126 (1979), involved a different question, its underlying concern of protecting the role of the union applies to this setting.

For example, adoption of the Petitioner's position would create two alternatives for employers about to file § 301 actions. One, the employer could choose whether or not to sue the union or the employees. The employer, in the interest of not undermining its long term dealings with the union, may selectively sue some or all of the striking employees, instead of the union. The second alternative of the employer would be a multi-count 301 suit[14] in which the

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[14] The format for this sort of suit is illustrated in Atkinson, 370 U.S. 239-40, 245, 249 n. 7 and Sinclair, 452 F.2d at 51. Although such complaints are at times filed, presently the claims against the individual employees

employer sues the union and, in the event it is not able to prove the liability of the union within the principles set forth in Carbon Fuel Co. v. United Mine Workers, 444 U.S. 211, 218 (1979), proceeds against the individual employees. The simultaneous or consecutive trials of the separate claims could hardly serve the policy of avoiding "industrial strife" but would "embroil" the federal judiciary in a new type of litigation.[15] Indeed,

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14/(cont'd)
rarely proceed to trial presumably due to the rulings of the Courts of Appeals.

15/ In Buffalo Forge Co. v. Steelworkers, 428 U.S. 297, 410 n. 12 (1976), the Court expressed concern about the range of litigation which could result if it had expanded the Boys Markets doctrine. The issue of arbitrability involved in Buffalo Forge only arises in some strikes. By contrast, the issue of whether the union or the employees were responsible for a wildcat strike is inherent in nearly every § 301(a) suit brought to collect damages

careful employer counsel could feel obliged to sue individual employees in the interest of avoiding the perils of res judicata if there were any doubt about the evidence of union responsibility required by Carbon Fuel.

The circumstance that 301(b) does not expressly rule out damage claims against striking employees does not mean that such claims exist. As was noted in Sinclair, the drawing of such a negative inference is illogical:

15/(cont'd)

for "wildcat" strikes.

> We do not see how, in view of sub-paragraph (b) and the "Danbury Hatters" notion ... an implication can reasonably arise from the terms of § 301 that Sinclair may recover damage against the individual defendants.

452 F.2d at 52. Congress, having declined to create such jurisdiction in § 301(a),[16] made it doubly clear in § 301(b) that jurisdiction over damage claims did not exist.

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[16] The argument at Pet. 8, that Smith v. Evening News Association, 371 U.S. 195 (1962), and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), somehow provide a basis for expanding 301 jurisdiction to include its claim is mistaken for several reasons. It ignores the directive of Atkinson that the "Danbury Hatters" policy of § 301(b) is to be applied broadly. See p. 8 above. Smith involved a claim by employees for wages wrongfully withheld on account of an apparently admitted discriminatory denial of work and was essentially a claim for past due wages based on a collective bargaining agreement. The wage claim could be enforced either by

16/(cont'd)
the union or by the individual. The question decided was whether any court had jurisdiction to hear the case, or whether it was preempted by the exclusive jurisdiction of the NLRB. See 371 U.S. at 197-201. Smith simply did not involve the boundaries of § 301(a) now in question.

The coincidence that Smith allowed a wage claim by an individual and that this case involves a claim against individuals provides no basis for creating 301 jurisdiction in the wildcat strike setting herein. Apparently, Hines is cited merely as authority because it repeats the statement made in Smith that 301 contemplates unspecified suits by and against individual employees.

New York State United Teachers v. Thompson, 459 F.Supp. 677 (N.D. NY 1978), may illustrate the type of unspecified cases alluded to by Smith and Hines. The employer in Thompson asserted a restitution type of claim against two professional employees, for a proportionate rebate of salary and travel expenses advanced to the employees so that they could take extended educational leaves. A collective bargaining agreement expressly provided for such a rebate. The District Court emphasized that the employer could not assert its claim for restitution in the grievance procedure established by the collective agreement (459 F.Supp.

CONCLUSION

For the reasons stated above, the Court should deny the Petition.

Respectfully submitted,

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16/(cont'd) at 682) and "the usual employer remedies of discipline and discharge [were] non-existent". 459 F.Supp. at 683. Thompson did not involve the Danbury Hatters policy of § 301(b), and, by contrast, seemed to the district court to be the kind of case -- unique as it was -- which fit within § 301(a). See 459 F.Supp. at 682, 684.